

1902629 (Migration) [2020] AATA 4730 (4 November 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1902629

MEMBER: Kira Raif

DATE: 4 November 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 04 November 2020 at 3:56pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – application made more than 28 days after last substantive visa held – compelling reasons for not applying criterion – sponsor’s mental health – applicant’s relationship with step-child – fear of persecution in home country – previous protection visa application refused and refusal affirmed – credibility – relationship formed quickly after student visa expired and application for protection visa made – timing of sponsor’s treatment in relation to visa application – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 820.211, Schedule 3, Criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

Chan v MIBP [2017] FCCA 2883

MZYPZ v MIAC [2012] FCA 478

Nazir v MIBP [2018] FCCA 861

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 24 July 2017 on the basis of his relationship with his sponsor. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant met Item 3001 and found that there were no compelling reasons to waive that requirement. The applicant sought review of the delegate's decision.
3. The applicant appeared before the Tribunal on 4 November 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The applicant was represented in relation to the review by his registered migration agent. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Relevant law

4. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
5. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2).

Does the applicant meet Schedule 3 criteria?

6. The applicant provided to the Tribunal a copy of the primary decision record. It indicates that the applicant entered Australia holding a Student visa in July 2013. That visa was in effect until August 2015. The applicant became an unlawful non-citizen for a period of 45 days before making an application for a substantive visa, which was unsuccessful. The applicant was granted a number of bridging E visas on departure grounds before making the application for a Partner visa in July 2017.
7. The Tribunal finds, having regard to that evidence, that the applicant last held a substantive visa before the expiry of his Student visa in August 2015. He did not have a substantive visa since that time and he was not a holder of a substantive visa at the time the application for the Partner visa was made. There is nothing to suggest that the applicant entered Australia as a holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder. The Tribunal is not satisfied the applicant meets cl. 820.211(d)(i).
8. The applicant is required to satisfy the Schedule 3 criterion 3001 for the purpose of cl. 820.211(d)(ii). There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to

indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.

9. The Tribunal has found that the applicant ceased to hold a substantive visa when his Student visa ceased in August 2015. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3. As the application for the Partner visa was made in July 2013, the Tribunal is not satisfied that the application was validly made within 28 days after the relevant day. The Tribunal is not satisfied that the applicant meets Item 3001.
10. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

Compelling reasons

11. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
12. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
13. The Tribunal has concerns about the applicant's credibility. Firstly, the Tribunal is concerned about the timing of the various events. After the applicant's Student visa expired and the applicant had no visa to remain in Australia, the applicant made the application for a protection visa. This was done considerable time after the applicant's entry to Australia. In the Tribunal's view, a person who is genuinely fearful of harm in their home country would take the earliest possible opportunity to seek protection, not wait until his other visa options expired. The applicant then met the posnsor and their relationship formed very quickly to enable the applicant to make an application for a Partner visa once his other visa options were exhausted. The applicant explained to the Tribunal that he met the sponsor before his protection visa was refused and the relationship formed quickly because they were right to each other but the Tribunal finds that explanation unconvincing. The timing of the applicant's relationship with the sponsor is of concern.
14. The second issue of concern is that the Departmental records show that the applicant was granted a number of Bridging visas on departure grounds but he then made visa applications onshore. That is, the applicant claimed in his dealings with the Department that he was making arrangements to depart Australia when he had no intention of doing so. The applicant told the Tribunal that his wife's health had deteriorated and while he initially had the intention of leaving Australia, he then changed his mind. However, the Tribunal is mindful that the applicant was granted several bridging visas on departure grounds, including prior the time he made the application for the protection visa, when his wife's health was not an issue. It appears that the applicant was not entirely truthful in his past dealings with the Department and in the Tribunal's view, that raises concerns about the applicant's overall credibility.

15. The applicant provided a number of reasons for the waiver in his written submission to the delegate and his written and oral evidence to the Tribunal. The applicant claims that he and the sponsor are in a long term genuine relationship and that the sponsor would be adversely affected if they were to be separated, particularly having regard to her mental health. The applicant provided a number of documents to the delegate and the Tribunal concerning his relationship with the sponsor and a detailed outline of his relationship history in his written submission to the Tribunal of 27 October 2020 and oral evidence. The applicant provided a variety of supporting documents addressing different aspects of the relationship. The Tribunal acknowledges that evidence. Without assessing the nature of the relationship, the Tribunal is prepared to accept, only for the purpose of this review, that the applicant and the sponsor may be in a genuine long-term relationship. However, in the Tribunal's view, that is not sufficient to establish the existence of a compelling reason for not applying the Schedule 3 criteria.
16. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.
17. Since the existence of a genuine spousal relationship is the basic requirement for a partner visa application, the Tribunal is not satisfied that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship or the parties' temporary separation are on their own and without more, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied on the evidence that the parties' relationship is a compelling reason for not to apply the Schedule 3. In reaching this conclusion, the Tribunal has had regard to the reasoning in *Chan v MIBP* [2017] FCCA 2883 at [14] and *Nazir v MIBP* [2018] FCCA 861 at [29]–[30].
18. The Tribunal has considered the medical evidence relating to the sponsor. There was before the delegate a report from a psychologist [Mr A] dated 10 July 2017. It refers to the sponsor self-reporting symptoms and, with the help of DASS (a self-reporting questionnaire) the sponsor has been identified as suffering from severe level of stress, an extremely severe level of anxiety-related symptoms and moderate level of depressive symptoms. It is also stated that the sponsor experience moderate impairment in many areas of general functioning. It states that the removal of the sponsor's spouse from Australia will have significantly detrimental consequences on the applicant's and sponsor's psychological health and well-being.
19. The report states that the sponsor presented to therapy on 1 July 2017. It is of concern to the Tribunal that she did so less than three weeks before the application was made, even though on the application form the couple claims to have committed to a shared life in September 2016. (In her submission to the Tribunal of 16 September 2020 the sponsor refers to a 'misunderstanding' which resulted in the incorrect dates being stated in the medical report.) The applicant told the Tribunal that his wife has been seeing a number of psychologists from 2016 (the sponsor said she started seeing a psychologist in 2017) but there is little documentary evidence of ongoing treatment from that time. The fact that the sponsor saw [Mr A] shortly before the applicant made his visa application suggests that the

purpose of that visit was to obtain the report to assist the applicant with his visa. In such circumstances, the Tribunal considers the self-reported symptoms set out in the report to be self-serving. The Tribunal also does not accept the health provider 's recommendation that the applicant's departure from Australia would have a detrimental effect on the sponsor's health, as the Tribunal has formed the view that the information was given to the health professional for the benefit of this visa process.

20. The second psychological report, presented to the Tribunal, is dated August 2020 and suggests that it was prepared at the request of the applicant's migration representative and after the applicant received an invitation to attend Tribunal hearing. Again, it appears that the purpose of the sponsor seeing that health professional was to assist the applicant with the visa process. In the Tribunal's view, that is not consistent with the claim that the sponsor has an ongoing need for treatment of her condition when the sponsor only seeks professional help in relation to that issue when the applicant requires written evidence in support of his visa application.
21. However, there is other medical evidence relating to the sponsor before the Tribunal. This includes evidence of the sponsor's hospitalisation and treatment between 2017 and 2020 and an updated medical report. In oral evidence, the applicant and sponsor refer to the sponsor attending multiple sessions with psychologists. The applicant told the Tribunal that the sponsor does not take any medication but has been regularly seeing psychologists. The Tribunal accepts that the sponsor has been receiving treatment.
22. The applicant claims that the sponsor would be unable to overcome her mental health issues without his help and that separation would be detrimental to the sponsor's health. Both the applicant and the sponsor spoke about the help and support the applicant provides to his wife and the sponsor's need to rely on such support. The Tribunal is prepared to accept that evidence. However, the Tribunal does not accept the parties' evidence that applicant would be unable to provide support to the sponsor even if the partners were separated for a period of time it may take the applicant to make another visa application offshore and be granted the visa (if their relationship is assessed as being genuine). The applicant and the sponsor described in oral evidence the nature of support the applicant provides to the sponsor. It seems to comprise, primarily, emotional support, encouragement and counselling. The Tribunal is of the view that such support can also be provided if the parties were to communicate by electronic means, for example.
23. The Tribunal accepts the evidence that the applicant also provides physical support to the sponsor and her son, including attending medical appointments with the sponsor, attending the son's school, taking the child to various functions and performing other domestic chores. Such support would not be available if the applicant was to leave Australia but the Tribunal does not consider that the withdrawal of such support, in all the circumstances of this case, constitutes a compelling reason for the waiver.
24. In particular, having regard to the nature of the treatment being received by the sponsor (which is limited to counselling), her ability to maintain full-time employment and a responsible role in childcare, the Tribunal has formed the view that the sponsor's condition is not of such severity that the withdrawal of the applicant's in-person support would amount to a compelling circumstance justifying the waiver. The Tribunal is of the view that the applicant will still be able to provide some degree of support even if he is not in Australia, and while the Tribunal acknowledges that it would be of different nature and may be diminished, as noted above, the Tribunal does not consider that in the particular circumstances of this case, such diminution of care and support by the applicant would amount to a compelling reason for the waiver.

25. The applicant told the Tribunal that his student visa expired because he was misled by the university. The education provider told him they would issue him with the CoE to extend the visa and he relied on that advice and waited for the CoE but then his visa expired and the university did not help him. The Tribunal acknowledges the applicant's evidence but the circumstances leading to the expiry of the applicant's student visa some years before the partner visa application was made, and which had not affecting the making of this application, do not constitute, in the Tribunal's view, a compelling reason to waive the requirements of Schedule 3.
26. The applicant spoke about his close relationship with his step-son. He stated that it was hard at first to establish that relationship but they have now established a close relationship and he provides help and support to his step-son, who has been subjected to bullying at school. The applicant states that he has been listed as a guardian on the son's school records and he referred to the activities he and the child had been involved in, including attending movies, playing sport, etc.
27. There is little documentary evidence of a relationship (let alone a close relationship) between the applicant and his step-son. There is no evidence of their joint social activities or interactions. There is little evidence to show that the applicant has assumed parental responsibilities or that he is perceived as having a parental role by third parties, although the Tribunal acknowledges he has been nominated as a guardian at the child's school. For example, there are no statements from the child's school, other parents or family friends about the applicant's active role in the child's upbringing or daily life.
28. Nevertheless, the Tribunal is prepared to accept that a relationship may exist between the applicant and his step-son. However the Tribunal is not satisfied whatever support the applicant provides to his step-child, including any emotional and financial support, can only be provided if the applicant is physically present in Australia and if the family resides under one roof, that is, if the waiver is applied. In the Tribunal's view, if the applicant is required to leave Australia, he will still be able to maintain a close relationship with the sponsor and the child if he claims such a relationship exists now. They will be able to maintain frequent contact and the applicant will be able to continue to provide emotional support to the child, if he claims to be providing such support now. It is not uncommon for partners and children to be separated and such separation need not preclude the provision of emotional support. The same issue applies in relation to the financial support, if that support is being provided by the applicant. There is no obvious reason why the applicant could not obtain employment in his home country to provide financial support to his partner and step-child if such support is needed, even if his income could be diminished. As for physical support, the Tribunal is mindful that if the applicant was to leave Australia, any period of separation will be temporary. If the present relationship is genuine, the applicant will be able to make another application for a Partner visa and may be granted such a visa. There is little evidence to satisfy the Tribunal that the sponsor or her son will be significantly affected by the temporary withdrawal of physical support, even if it may cause a degree of hardship to the sponsor and her son. The Tribunal does not consider that in the circumstances of this case, the withdrawal of such support constitutes a compelling reason for the waiver.
29. The applicant states that he is fearful of returning to his home country because he may face persecution there. In oral evidence, the applicant referred to a land dispute and his parents' lack of support for his marriage. The Tribunal notes that the applicant presented no documentary evidence concerning any land dispute or any other dispute with his family in India or with others. The applicant told the Tribunal that others are in power and he has no power and no ability to obtain evidence. The Tribunal finds such claims to be vague and unhelpful. The Tribunal is under no obligation to accept the applicant's claims unquestioningly.

30. The Tribunal is also mindful that the applicant's claims have been assessed as part of his earlier protection visa application. The applicant was found not to be a refugee by a delegate of the Minister and, on review, by the Tribunal. That implies a determination that the applicant will not be subjected to harm under the protection obligations or complementary protection obligations. The applicant has not presented probative new evidence to the present Tribunal that would cause the Tribunal to question the correctness of the earlier determination. The applicant has not satisfied the Tribunal that the earlier decision was incorrectly made or failed to have regard to his circumstances. Neither has the applicant satisfied the Tribunal that his circumstances have changed from the earlier determination and that due to the new circumstances, he would be subjected to harm. The Tribunal is mindful that if the applicant believes the circumstances have changed, he may be eligible to seek a waiver in relation to a future protection visa application. On the limited evidence before it, the Tribunal is not satisfied the applicant would experience any harm or persecution if he was to return to India. The Tribunal does not consider this to be a compelling reason for the waiver.
31. The applicant told the Tribunal that the situation with his family has not improved, and has deteriorated, particularly after he married the sponsor. His family do not support his marriage and Indian parents generally prefer to find partners for their children. The Tribunal is of the view that as an independent adult, the applicant could live in India without the support of his parents, if he does not wish to live with his parents. The applicant said that in India, there is high population and the unemployment rate is very high, so he cannot live anywhere other than his home state. The applicant states that he has no money and no support and cannot live independently. The Tribunal does not accept that evidence. The applicant has not presented any evidence of having sought employment and of having been unable to find a job in India. There is little objective evidence to support the applicant's assertion that there is a high unemployment rate in India and, further, that in the applicant's particular circumstances, having regard to his background, experience, language and other skills, he would be unable to find employment. The Tribunal does not accept the applicant's evidence and does not accept the applicant's claim that he could not live independently and that he would experience financial hardship if he was to return to India.
32. The applicant states that Covid is a big issue in India and there is no adequate medical treatment there. That is also a reason why his partner cannot travel with him in India. The Tribunal accepts that if the applicant was to leave Australia, his partner would most likely remain in Australia and that this means the parties would be separated potentially for a lengthy period of time. As noted above, the Tribunal does not consider that a period of separation, even a lengthy one, constitutes a compelling reason for the waiver. The parties can maintain contact with each other by electronic means. They may be able to visit each other. If their relationship is genuine, the applicant will be able to seek another Partner visa in the future. While separation may cause considerable hardship to them, particularly given the sponsor's health, the Tribunal does not consider the degree of hardship to be of such severity as to constitute a 'compelling' circumstance for the waiver.
33. As for Covid, the Tribunal is mindful that it also exists in Australia. The applicant refers to inadequate health services in India but in the Tribunal's view, that reasoning is circumstantial because it would only be relevant if the applicant does become affected by Covid and requires hospitalisation. The applicant has not satisfied the Tribunal that he would have no access to adequate medical treatment, if needed. The applicant noted that it may not be possible to travel to India due to travel restrictions and if that is the case, it may be possible for the applicant to be granted a bridging visa until he is able to depart Australia. The Tribunal does not consider these circumstances constitute a compelling reason for the waiver.

34. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal does not accept some of the applicant's evidence but generally accepts, for the purpose of this review, that the applicant provides support to the sponsor and has formed long – term relationship with the sponsor and his step-son. The Tribunal accepts that much of that support cannot be provided if the applicant was to leave Australia and that the overall level of support would be diminished if the waiver is not applied. The Tribunal accepts that the applicant's departure would cause a considerable degree of hardship to the parties. However, the Tribunal has also had regard to the nature and severity of the sponsor's condition and the fact that the applicant will be able to maintain the relationship with the sponsor and with his step-son and provide at least some level of support even if he does not reside in Australia. The Tribunal has also rejected the applicant's claims in relation to the family dispute and financial hardship he may experience in India. In these circumstances, the Tribunal has formed the view that none of the circumstances put forward by the applicant, whether taken singularly or cumulatively, are of sufficient gravity as to be of 'compelling' nature.
35. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).

Conclusion

36. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

37. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Kira Raif
Senior Member